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UMAN RIGHTS AND CRIMINAL LAW

Introduction

ıe elections in April/May 1990 marked the irrevocable end of a ;astrous experiment and the beginning of a new era in the history of ; Hungarian people and also in the history of human rights in the untry. Hungary's likely admittance to the Council of Europe in the ar future may be interpreted as some kind of acknowledgement of ; country's adherence to the values that govern pluralistic democ-;ies and to the Western approach to human rights. One may ;refore assume that the analysis of human rights issues by someone)m a Middle or East European region has lost its »charm« and perts of the Western world are going to be deprived of the ellectual excitement brought about by the exotic treaties on human ;hts of their Eastern European colleagues. It may be thought that ırope is marching towards boring uniformity. Unfortunately, this is t the case. The heritage of the past cannot be eliminated overnight d the unique historical situation, i.e. the transformation from a alitarian political system, which has declared its adherence to, in actice abused values such as social care and solidarity, into a ıralistic democracy with a market economy has created particular

tensions which clearly distinguish the countries of the former socialist community from the rest of Europe, as far as their approach to human rights is concerned.

2. The Interpretation of Human Rights in Contemporary Hungary

Let me first formulate my thesis and then give the reasons for my point of view. I have the impression that the current interpretation of human rights in Hungary as well as the concepts concerning the role of criminal law and criminal justice in protecting human rights correspond to 19th century interpretations — interpretations which have been basically modified in the Western world of today.

If one takes a glance at the history of human rights and their relation to penal law one may discover the following process. In phase one the state provides for the protection of certain fundamental values such as life, personal integrity or personal liberty against potential violations on behalf of »third persons», i.e. other individuals or private groups. It is only in phase two that the State commits itself to respecting values previously only protecting against violations by other individuals. In this way some values are raised to the level of fundamental rights. It is the extension of protection, or more precisely the direction of protection, namely protection against interference on behalf of the State that transforms a legal object into a human right. In this second stage the state's obligation is simply to tolerate, not to interfere. The transformation of some of the values into human rights leads to certain changes in the scope of criminal law. It is not as if the State had held out the prospect of complying to its promise of non-interference in criminal law. On the contrary, as the exercise of human rights has been subject to certain limitations from the outset, criminalization is a means of preventing the exercise of human rights

in an abusive way. The criminal offences of slander or libel or contempt of court can set limits to freedom of expression, and also abuse other political freedoms such as the freedom of assembly and of association may become subject to criminal prosecution.

In the third stage the duty of the State to tolerate the exercise of human rights is supplemented by its obligation to care through activity, i.e. through legislation and the administration of justice for the general respect of human rights.

The European Convention of Human Rights for instance when it declared in Article 2 that »everyone's right to life shall be protected by law» requires not only non-interference but calls upon member states to provide protection by criminalizing and prosecuting actions that violate an individual's right to life. In so doing the State becomes not only a potential violator but also at the same time the guarantor of human rights. As a consequence the catalogue of human rights has been extended by the individual's right to an effective penal system and administration of justice. This extension of human rights leads of course to a situation where the conceptual clarity of human rights, i.e. their logical consistency ceases to exist, and it becomes the particular task of the high courts or the constitutional courts to decide almost on a case to case basis, the degree of permissible state intervention in the name of preserving the effectiveness of a criminal justice system which is still compatible with a general respect for human rights.

In the field of substantive criminal law the new approach does not lead to dramatic changes and does not induce particular tensions. The general obligation of safeguarding human rights simply calls upon states to protect values, like those of personal integrity or life, which traditionally fall within the competence of criminal, law more diligently. (In relatively smoothly functioning democracies the protection of political freedoms — the freedom of assembly or of

association — against potential violations on behalf of private individuals is generally not considered to fall within the competence of criminal law. Protection using the criminal law may come into its own where violations occur through transgression of values traditionally protected by criminal law — for instance the violation of personal freedom or physical integrity. This is not the case in newly emergent democracies but I will refrain from analyzing this issue here).

The only decision I know where the European Court of Human Rights held that there has been a breach of the Convention because of failure to provide protection by criminal law, concerned sexual integrity. This, of course, should not be interpreted in a way that does not take account of the fact that tensions may appear in areas of substantive criminal law. The obligation of the State to provide for the protection of fundamental rights may, for instance, lead to a review of legislation on abortion, euthanasia and also the general part of penal codes may be affected as has been indicated by the discussions on whether the German regulation on self defense is consistent with the respect for life as laid down in Article 2 of the European Convention.

However, far greater problems arise in the criminal process when the community's right to an effective criminal justice system is confronted by some other human rights such as the right of privacy or the right to be confronted with witnesses which forms part of the right to a fair trial. This tension is reflected in the growing number of cases where the use of agents provocateurs, anonymous witnesses or the surveillance of the post, and telecommunications are at issue.

Turning now to the specific situation in Hungary I am under the impression that criminal law and the law of criminal procedure in the last one and a half year have been reshaped in the spirit of the classical notion of human rights which in modern western democracies

is perhaps viewed as somewhat outmoded or at least one sided. The changes in Hungary have been carried out under the assumption that respect for human rights requires nothing but non-interference on behalf of the State, and the idea that the State should also provide for the effective protection of human rights against potential attacks by other individuals has been given much less attention. This attitude is reflected also in the fact that in prosecuting the abusive exercise of human rights which, as we saw, forms part of the traditional functions of penal law, both the legislator and the crime control agencies have been rather dragged their feet.

The amendment of the penal code in 1989, for instance, reduced the penalties that could be imposed on individuals inciting hatred against racial or religious minorities exactly at a time when growing social tensions and economic difficulties are likely to induce hatred and discrimination against minorities in a way that has clear historical precedents.

The legislator's message was probably based on the everyday assumption of the prosecuting authorities that freedom of expression could be abused without any serious consequences that could ruin human existences. The magical formula used, invented by a socialist criminal law, namely the low degree of danger to society which justifies non-prosecution in a cynical way, has proved also to be the perfect instrument for this purpose.

One can easily find an easy explanation of this specific approach to human rights: it is clearly a kind of reaction to the interpretation of human rights over the last 40 years which has tried to legitimate extremely repressive criminal policies by constantly referring to the need for the effective protection of community's fundamental rights against individual offenders.

The same attitude led to the amendment to the code of criminal procedure last year. The legislators introduced, for instance, significant guarantees of the privilege against self incrimination without even considering the problem of whether statements made during investigation could be taken into consideration in cases where a defendant make use of his right to remain silent at the trial stage. Or to give a another example: the exclusionary rule introduced by the amendment has been formulated in such a way that even the slightest technical misconduct of the crime control agencies would lead to the exclusion of evidence.

But there are other phenomena which indicate that the present intellectual atmosphere favours the return to the ideas of 19th century classical liberalism as far as the criminal justice system is concerned. One may mention the growing popularity of neoclassicism which, in Western Europe, seems to have lost its attractiveness. But I could also refer to the fact that in the discussions on restructuring the administration of justice almost no mention has been made of the social components »des sozialen Rechtstaates». We are debating how the advocacy should be reformed, how to distribute the property of the chambers among its members, the abolishing of state determined fees is vehemently advocated, and we do not notice that in the meanwhile our clients are disappearing and the fundamental right of access to justice, under the conditions of mass pauperization, is, likely to become a mere illusion. Or as regards the reform of the law of criminal procedure, the 1896 code seems to serve as the only point of reference and no one seems for instance to be worried about the humiliating position of those who have become the victims of crime.

The explanation seems to be obvious again: the new democracy has been created as a negation of an authoritarian regime which rhetorically declared its adherence to values such as solidarity and sensitivity

to social issues, therefore any human rights concept that goes beyond formal equality seems to be discredited for the time being.

However, should we fail to succeed in overcoming this one-sided approach we shall reinforce our second rank position among the nations of Europe. Hungary's joining the Council of Europe and signing the European Convention of Human Rights may serve as incentives that facilitate the acceptance of a more balanced and refined human rights concept. And here I can introduce the second point of what I intend to expound, i.e. the possible impact of the Convention on the reform of our law of criminal procedure.

3. The European Convention of Human Rights and the Reform of the Criminal Process

Let me start by the statement that the application of the European Convention of Human Rights by the Strasbourg organs seems to be much more instructive for the reform of procedural law than for substantive criminal law. Stefan Trechsel is certainly right when he attributed the relative indifference of the Convention to questions of substantive penal law to the Anglo-American legal tradition which served as some kind of model for the drafter's of the Convention.

That is why excessively harsh sentencing does not fall within the scope of review of the Strasbourg organs, and therefore it is hardly surprising that in the Court's opinion the presumption of innocence does not apply at the sentencing stage (Engel case). However, the relatively broad margin of interpretation left to the states is not limited to the phase of sentencing. According to the case law of the Human Rights Court states are free in selecting the types of behaviour which are defined as criminal offences and those which are sanctioned by disciplinary or administrative law only, (Öztürk case) and as indicated

in a recent case the constituent elements of the criminal offence can be construed to incorporate the defendant's duty to clear himself in a manner which in the Court's opinion does not represent a breach of the presumption of innocence (Salabiaku-case).

On the other hand, I find that the practice of the Strasbourg organs is extremely instructive as far as issues of criminal procedure are concerned. This again is partly due to the influence of the Anglo-American approach which puts the main emphasis on procedural fairness. The main reason, however, may be because the provision laid down in Article 6 on fair trial called upon frequently by the applicants is formulated in such a way as to necessitate the need for interpretation in almost every case that reach the Commission or the Court.

We in Hungary are at present in a unique situation. On the one hand there seems to be a general expectation among both professionals and the public to have a completely new law of criminal procedure and court system (as it is generally the case with societies undergoing dramatic political changes). On the other hand our joining the Council of Europe and our signing the European Convention of Human Rights may be interpreted as some kind of external pressure to change the law. Now, we happen to be in a unique and almost ideal position because the overall restructuring of our criminal procedural law and the task of adjusting our legislation to the provisions and the case law of the Convention coincide in time.

Let us now look at some ways in which the Convention as reflected in the case law of the Human Rights Court may effect the process of legislation in the domain of criminal procedural law in the future. I shall set out from the more detailed issues and then move towards the more general message that can be inferred from the case law of the Strasbourg organs.

If one takes a glance at the decisions of the Human Rights Court one can easily discover points where the present law is in apparent contradiction to what is required by the Convention. It is evident, for instance, that the five-day period preceding the court's decision on pretrial detention has to be reduced, the rules on compensation for unlawful detention modified and the whole problem of disciplinary procedure and disciplinary sanctions in their relation to military criminal procedure have to be reviewed, just to mention a few examples where the Strasbourg organs would surely find Hungarian law to be in breach of the Convention, if the present regulations prevail.

But apart from some minor modifications, the present Hungarian criminal procedural law seems to correspond by and large with the provisions of the Convention. However the devil is certainly residing in the details, and I am afraid that after a more in depth analysis of the Court's case law and a comparison with the provisions of our present law of criminal procedure we shall discover some further weak points in our legislation.

However, an examination of how the Convention is actually applied may also be useful in checking whether the Convention which has been operating in other jurisdictions and which we are planning to introduce will stand the test of the Strasbourg organs. The latest decisions on the acceptability of hidden investigation methods, on anonymous witnesses or on the problem of deals in the criminal process may serve as useful information for the Hungarian legislator, even if some experts commenting on the mentioned judgements have certain doubts as to the instructiveness of the decisions because of the Court's much too cautious approach.

From the point of view of restructuring our law of criminal procedure, it is not only the judgements themselves but also their

motivations, and even the comments on certain decisions that may help the drafting work.

Let me give just one example: in the debates on how to reshape Hungarian criminal procedure a considerable number of those in the legal profession believe that one should return to the institutions introduced by the 1896 Code, to the Jury, the chamber d'accusation and the investigating judge. In deciding whether the investigation judge should be authorized to lead the pretrial procedure or not, it may be useful to study the case law of the Human Rights Court in cases where applicants complained of an alleged violation of Article 5 paragraph 3, which rules that persons arrested or detained shall be brought before a judge or some other officer authorized by law to exercise judicial power.

The court dealt in a number of cases with the interpretation of this provision, one of the cases being that of Mr. Schiesser, where the court was called upon to decide whether the Winterthur Bezirksanwalt (district attorney) performing investigating and prosecution functions at the same time had the qualities, and the attributes of a judge and could, therefore, be regarded as an officer who may exercise judicial power. Actually, it is not so much the outcome of the case that is important for my purpose rather the reasoning and the comments on the case, which may support the thesis that an agency performing an investigating function may not be neutral and lacks the attributes an officer deciding on pretrial detention should possess. This, at the same time, may serve as an argument against the introduction of the institution of the investigating judge who, as a result of some kind of historical compromise simultaneously performs investigating and judicial functions. (I should, however, add that this argument is strong enough if other factors supporting the institution are lacking, such as a legal tradition which is a strong legitimating force. This seems to be

the case in Hungary where the investigating judge has failed to become an integral part of the criminal justice system).

Finally, may I point to a general message that I perceive when studying the case law of the Strasbourg organs and which may be taken as some kind of guiding principle when reshaping our law of criminal procedure.

Let me come back once more to Article 6 of the Convention and particularly to the questions of the tribunal's impartiality and the presumption of innocence. Both principles in the Court's and the Commission's case law are interpreted not exclusively in objective terms, but there is a certain subjective aspect by which their prevalence and observance are evaluated. By this I mean that the quality of procedural arrangements is measured not on an objective basis only, but also on how they are perceived by those affected, primarily by the defendants. States, therefore are called upon to provide for procedural arrangements which make the judge also *appear* impartial in respecting the presumption of innocence. This concept fits into the general approach according to which justice has not only to be done but also seen to be done. By this the defendant's perception becomes one criterion by which the fairness of the various procedural arrangements can be determined.

For our projects of drafting a new law of criminal procedure this approach suggested by the case law of the Strasbourg organs implies the elimination of all procedural arrangements which tend to evoke doubts concerning a court's impartiality. This calls among others for the revision of the simplified procedure in the case of misdemeanours where the absence of the prosecutor forces the judge by necessity into the position of the accuser. The same consideration, namely a concern for the defendants' perception should make us think of creating new procedures in trials, such as a system of »proof taking« in the trial

where the judge is freed from all inquisitorial functions that may make him appear partial and prejudiced.